FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

May 25, 2000

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. YORK 99-39-M
DOUGLAS R. RUSHFORD TRUCKING	:	

BEFORE: Jordan, Chairman; Marks, Riley, Verheggen, and Beatty, Commissioners

DECISION

BY THE COMMISSION:

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977 ("Mine Act" or "Act"), 30 U.S.C. § 801 et seq. (1994). At issue is Commission Administrative Law Judge Gary Melick's decision assessing a penalty against Douglas R. Rushford Trucking ("Rushford") for a violation of 30 C.F.R. § 56.14104(b)(2), as charged in a citation issued by the Department of Labor's Mine Safety and Health Administration ("MSHA") in connection with a fatal accident that occurred at Rushford's Seymour Road Pit. 22 FMSHRC 74, 76-78, 80 (Jan. 2000) (ALJ). The Commission granted the Secretary's petition for discretionary review challenging the judge's penalty assessment. For the reasons that follow, we vacate the judge's penalty assessment and remand for reassessment.

Our decision in this matter is one of three decisions we are issuing today regarding the Commission's penalty assessment authority under section 110(i) of the Mine Act, 30 U.S.C. § 820(i).[1]

[1] The other decisions concerning Commission penalty assessments we are issuing today are *Hubb Corp.*, Docket No. KENT 97-302, and *Cantera Green*, Docket No. SE 98-141-M.

I.

Factual and Procedural Background

Rushford Trucking operates the Seymour Road Pit in Clinton County, New York. S. Pretrial Statement, Stipulations ¶ 1. On August 28, 1998, when Rushford employee Nile Arnold attempted to inflate a tire on a fuel truck, the wheel rim exploded and struck Arnold in the head. 22 FMSHRC at 74-75. At the time, Arnold was not using a stand-off inflation device, nor was there such a device available on the mine site. *Id*. at 75-76. On August 30, 1998, Arnold died as a result of the injuries he sustained. *Id*. at 74.

After conducting an investigation, MSHA charged Rushford with violating section 56.14104(b)(2), which requires that stand-off inflation devices be used "[t]o prevent injury from wheel rims during tire inflation." 30 C.F.R. § 56.14104(b)(2). MSHA also alleged that Rushford's violation was significant and substantial ("S&S") and the result of Rushford's unwarrantable failure to comply with section 56.14104(b)(2).[2] The agency proposed that the Commission assess a penalty of $25,000 against Rushford. Pet. for Assessment of Civil Penalty, Ex. A (May 24, 1999).

The judge found the violation "proven as charged." 22 FMSHRC at 76. He also found the violation S&S and due to Rushford's unwarrantable failure to comply with the cited standard. *Id*. at 76-78. In his discussion of the violation, the judge also found Rushford grossly negligent. *Id*. at 77-78. He based his unwarrantable failure and negligence findings on evidence that Rushford "never bothered to obtain a copy of the health and safety regulations governing the operation of [the] mine and the credible evidence that not only did the deceased fail to use an appropriate device for protection during tire inflation but that no such device was available either at the mine site . . . or at the mine shop." *Id*. at 77. The judge also found "credible [MSHA] Inspector Gadway's testimony that mine owner Douglas Rushford did not even know what a stand-off inflation device was." *Id*. at 78.

The judge made the following findings in support of his assessment of both a $3,000 penalty for the violation of section 56.14104(b)(2) and a $100 penalty for a violation of 30 C.F.R. § 50.10 not at issue here: "In assessing civil penalties herein I have also considered the operator's small size, lack of a history of recent violations, apparent good faith abatement and absence of evidence that the penalties would affect its ability to stay in business." *Id*. at 80.

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[2] The S&S terminology is taken from section 104(d)(1) of the Act, which distinguishes as more serious any violation that "could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard." 30 U.S.C. § 814(d)(1). The unwarrantable failure terminology is also taken from section 104(d)(1) of the Act, which establishes more severe sanctions for any violation that is caused by "an unwarrantable failure of [an] operator to comply with . . . mandatory health or safety standards." *Id*.

II.

Disposition

On appeal, the Secretary argues that the judge erred in failing to sufficiently explain how he weighed the six statutory penalty criteria (S. PDR at 10-11),[3] to explain his pronounced departure from the Secretary's penalty proposal (*id*.), and to make specific factual findings on each of the individual penalty criteria (*id*. at 11). In its Statement in Opposition, Rushford argues that, as to his penalty assessment, the judge "clearly took into account the six (6) statutory penalty criteria and applied [the] same in reducing the penalty." Opp. at 2. Rushford also argues that the Secretary's PDR should be dismissed because it was filed late and that review should not be granted because the company already paid the penalty assessed by the judge. *Id*. at 2-3.

The principles governing the Commission's authority to assess civil penalties de novo for violations of the Mine Act are well established. Section 110(i) of the Mine Act delegates to the Commission "authority to assess all civil penalties provided in [the] Act." 30 U.S.C. § 820(i). The Act delegates the duty of proposing penalties to the Secretary. 30 U.S.C. §§ 815(a) and 820(a). When an operator notifies the Secretary that it intends to challenge a penalty, the Secretary petitions the Commission to assess the penalty. 29 C.F.R. §§ 2700.28 and 2700.44. The Act requires that, "[i]n assessing civil monetary penalties, the Commission shall consider" the six statutory penalty criteria:

> [1] the operator's history of previous violations, [2] the appropriateness of such penalty to the size of the business of the operator charged, [3] whether the operator was negligent, [4] the effect on the operator's ability to continue in business, [5] the gravity of the violation, and [6] the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

30 U.S.C. § 820(i).

In keeping with this statutory requirement, we have held that "findings of fact on the [six] statutory penalty criteria must be made." *Sellersburg Stone Co.*, 5 FMSHRC 287, 292 (Mar. 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984). Although findings on each of the criteria may be entered by the Commission on review based on undisputed record evidence (*see Sellersburg*, 736

[3] In our Direction for Review, we stated that we would consider the Secretary's PDR as her opening brief. We also gave Rushford leave to file a response to the Secretary's PDR in addition to the Statement in Opposition it filed February 24, 2000. Rushford filed no response.

F.2d at 1153), this duty lies with the judge in the first instance, as is made clear in our Procedural Rules. Rule 30(a) provides:

> In assessing a penalty the Judge shall determine the amount of penalty in accordance with the six statutory criteria contained in section 110(i) . . . and incorporate such determination in a written decision. The decision shall contain findings of fact and conclusions of law on each of the statutory criteria and an order requiring that the penalty be paid.

29 C.F.R. § 2700.30(a). When reviewing a judge's factual findings on the six penalty criteria, we apply the substantial evidence test. 30 U.S.C. § 823(d)(2)(A)(ii)(I).

Findings of fact on the penalty criteria are necessary to provide the respondent with notice as to the basis upon which the penalty is being assessed. *Sellersburg*, 5 FMSHRC at 292. The findings also provide the Commission and any reviewing court with the information they need to accurately determine whether a penalty is appropriate. *Id*. at 292-93.

Once findings on the statutory criteria have been made, a judge's penalty assessment for a particular violation is an exercise of discretion, which is bounded by proper consideration of the statutory criteria and the deterrent purposes underlying the Act's penalty assessment scheme. *Id*. at 294. Although we review a judge's penalty assessment under an abuse of discretion standard (*U.S. Steel Corp.*, 6 FMSHRC 1423, 1432 (June 1984)), in order for us to determine whether a judge has properly considered the statutory criteria, the judge must provide a reasoned explanation for his or her penalty assessment. As we have held in another context, "[a] judge must analyze and weigh the relevant testimony of record, make appropriate findings, and explain the reasons for his decision." *Mid-Continent Resources, Inc.*, 16 FMSHRC 1218, 1222 (June 1994).[4]

An explanation is particularly essential when a judge's penalty assessment substantially diverges from the Secretary's original penalty proposal. *Sellersburg*, 5 FMSHRC at 293. As we noted in *Sellersburg*, without an explanation for such a divergence, "the credibility of the administrative scheme providing for the increase or lowering of penalties after contest may be jeopardized by an appearance of arbitrariness." *Id*.; *see also Unique Electric*, 20 FMSHRC 1119, 1123 n.4 (Oct. 1998); *Dolese Bros. Co.*, 16 FMSHRC 689, 695 (Apr. 1994).

The majority of cases decided by this Commission and its judges demonstrate that, generally, our judges' penalty assessments are made in accordance with these principles. Nevertheless, we reiterate them at some length here because, as we also note in the other

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[4] *See also Anaconda Co.*, 3 FMSHRC 299, 299-300 (Feb. 1981) ("Our function is essentially one of review. Without findings of fact and some justification for the conclusions reached by the judge, we cannot perform that function effectively.").

decisions issued today, in recent years we have found it necessary to remand several cases due to penalty assessments that lacked the requisite findings on the section 110(i) penalty criteria.

The instant proceeding is such a case as it presents us with a penalty assessment that lacks the precision necessary for appellate review. We find that the judge erred in several respects. First, he neglected to make findings on all of the section 110(i) criteria. Specifically, he made no explicit finding on the gravity of Rushford's violation of section 56.14104(b)(2).[5] He must do so on remand.

Second, although we agree with the Secretary that a judge "is not required to provide a lengthy or exhaustive analysis of the evidence" when assessing a penalty under the Mine Act (S. PDR at 8 n.3), a penalty assessment must provide enough explanation and analysis to enable meaningful appellate review. Here, although the judge stated he "considered the operator's small size, lack of a history of recent violations, apparent good faith abatement and absence of evidence that the penalties would affect its ability to stay in business" (22 FMSHRC at 80), he neglected to explain how his consideration of these factors affected his penalty assessment — leaving us with no rationale to examine in determining whether the judge properly considered the statutory criteria and the deterrent purposes of the Act. On remand, the judge must provide a more complete explanation of his penalty assessment. If on remand the judge again decides that a substantial reduction in the penalty proposed by the Secretary is warranted, he must explain any such decision, especially in light of his finding of "gross negligence."

Regarding the judge's finding that Rushford has a "lack of a history of recent violations" (22 FMSHRC at 80), the record indicates that between 1993 and 1998, the company did not file quarterly reports with MSHA as required under 30 C.F.R. § 50.30. Tr. I 239-41. Although the Secretary asserts that the reason MSHA did not inspect the mine during the relevant period was because of Rushford's failure to file quarterly reports (S. PDR at 12), she offers inadequate record support to substantiate this contention. If due in some way to the company's failure to meet a reporting requirement, Rushford's lack of a history of violations certainly could not properly be considered as a mitigating factor in a penalty assessment. Given that the record is unclear on this point, however, we direct the judge on remand to examine all relevant evidence on this issue, including whether any inspections occurred during this period and if not, the reason why they were not conducted. He may also order the record to be reopened on this issue if necessary. He must then enter a new finding on Rushford's history of violations.

We reject Rushford's argument that the Secretary's PDR was filed one day late and should be dismissed. Opp. at 2-3. The Secretary's PDR was timely filed on February 18, which is thirty days after January 20, "the day from which the designated period [began] to run." 29 C.F.R. § 2700.8. Rushford also argues that "it would clearly be prejudicial and unfair to the Respondent to now grant a review . . . after [Rushford] has paid in full the penalties imposed."

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[5] Such a finding is necessary despite the judge's determination that the violation was S&S.

Opp. at 3. This argument lacks merit. The appeal provisions of the Mine Act are not superseded by payment of a disputed penalty. *See* 30 U.S.C. § 823(d)(2)(A). Finally, Rushford raises several factual issues in its Statement in Opposition to the Secretary's PDR. Opp. at 2. The factual contentions, however, are outside the scope of the grounds on which we granted review, as set forth in the Secretary's PDR, 30 U.S.C. § 823(d)(2)(A)(iii), and therefore we do not reach them.

III.

Conclusion

For the foregoing reasons, we vacate the judge's penalty assessment and remand for reassessment consistent with this opinion.

Mary Lu Jordan, Chairman

Marc Lincoln Marks, Commissioner

James C. Riley, Commissioner

Theodore F. Verheggen, Commissioner

Robert H. Beatty, Jr., Commissioner

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